

No. 4290.

IN THE
United States //
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Roy Ward and Otto Peterson, co-
partners, doing business under the
firm name of Ward & Peterson, co-
partners,

Appellants,

vs.

Shope Brick Company,

Appellee.

Petition of Shope Brick Company, Appellee, for Rehearing.

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Petition of Shope Brick Company, Appellee, for Rehearing.

The petition of the Shope Brick Company, appellee in the above entitled suit, appealed from the United States District Court for the District of Oregon, respectfully shows as follows, to-wit:

That there are certain important features involved in the Shope patented process which were not sufficiently clearly presented to this court at the time of the hearing, and there were certain important exhibits

presented and used before the District Court which evidently were not before this court. These were Defendant's Exhibits X and Y, being respectively, one of the Shope bricks and one of the Ward & Peterson bricks, and which particularly demonstrate the impossibility of making a Ward & Peterson brick without using the Shope patented process or method.

These matters were due to some oversight, evidently on the part of both sides, and your petitioner represents to this court that the attorney who represented the Shope Brick Company was a general practitioner, and not a specialist in the law of patents, and he was not, therefore, experienced in presenting and analyzing patents for inventions, and in pointing out to the court the features which differentiate a new invention from the prior art.

The court below had before it all of the exhibits, including the exhibits above referred to, and heard all of the testimony in regard thereto, and unhesitatingly held that "The process used by the defendant was substantially the same as that covered by the patent."

This case is very much like that set forth in *King v. Hubbard*, 97 Fed. 795; 39 C. C. A. 423, in which it was held:

"This is an instance, not infrequent in patent litigation, where the infringer has sought to evade the claims of a patent, the substance of which he is appropriating, by deliberately impairing the function of one element, without destroying the substantial identity of structure, operation and result."

If appellee is to get full justice and full protection for the new process or method which he originated and which has gone into extensive use, and under which he has many licensees, and if he is to be put in position to shut out those who would evade the letter of his patent while still using substantially the same thing, and to protect his many licensees under his said patent, this court must look through the disguises, as was done in the case of *Crown v. Aluminum*, 108 Fed. 845; 48 C. C. A. 72 (citing: *Clough v. Mfg. Co.*, 108 U. S. 166 and 108 U. S. 178, and *Consolidated v. Crosby*, 113 U. S. 157). In that case the court said:

“The court will look through the disguises, however ingenious, to see whether the inventive idea of the original patentee has been appropriated, and whether the defendant’s device contains the material features of the patent in suit, and will declare infringement even when those features have been supplemented and modified to such an extent that the defendant may be entitled to a patent for the improvement.”

The Shope process involves something more than mere plastering over a surface. Plastering is applied to extensive hard surfaces, usually on vertical walls and ceilings, and on surfaces, if of cement, which have set or crystallized, with mortar which is of much heavier consistency. The Shope process, when considered in its real scope, is materially different in several important respects, namely:

The Shope process or method is applied to a brick or block which is green, that is, to a freshly formed

brick of a semi-dry mixture, so that it has a pronounced affinity for water or any liquid mixture, as distinguished from a brick or block which has set, or crystallized, or "cured". Shope was the very first to thus take advantage of this condition in a green brick made of such a mixture.

The action which takes place in connection with the Shope process, that is, when a liquid or soft mixture is applied to the surface of a brick so formed of a semi-dry mixture, is capillary attraction, or absorption, and not "by the natural force of gravity alone", as stated in the opinion, and this attraction is what carries the liquid and the cement into the pores of the green block or brick. The attraction is similar to the action of a sponge, or to that which takes place in the wick of an oil lamp.

Now to mix the water and powdered cement or other ingredients on a separate surface, close at hand, and then, while in its soft moist state, apply it to the surface of a green brick or block, and then agitate it to stimulate the penetration by capillary attraction and absorption, and thus get the same action and the same result in a more expensive way, is certainly the clear equivalent of mixing the water and powdered cement or other ingredients on the surface into which it is to penetrate. It is the absorption of the mixture into the surface of a green, or freshly formed brick in semi-dry condition, that constitutes the invention, coupled with sufficient agitation to stimulate or accelerate said absorption.

There was no evidence showing that a freshly formed brick, of semi-dry mixture, as set forth in the patent in suit, was ever before made waterproof by applying to its face a soft cement mixture and agitating the same sufficiently to accelerate the absorption or capillary attraction which carries the cement mixture into the pores of this green brick. *The pronounced affinity for moisture in a green brick* so made is the secret of the invention, and this was not sufficiently made clear and demonstrated to this court, although it was so demonstrated to the court below.

The Exhibits X and Y show the impossibility of making either of said exhibits without using the Shope patented process. These exhibits are what are known as "Oriental bricks", and constitute possibly fifty per cent of the output. They have various tints or colors in different spots or areas on the brick face. The colors are mixed cement and color in powdered form and are sprinkled on and stippled with a wet brush on the face of the brick. If they were troweled, or rubbed, it is evident that the colors would all be run together and the strongest color would determine the final tint, which would be uniform. This is clear. Therefore, the patented process is infringed in the very letter, as well as in the real spirit of the invention, when the dry coloring ingredients are thus sprinkled on the surface and stippled or agitated by any other movement than troweling or rubbing over the surface.

Appellee has developed his industry to a large extent and it is submitted that there is evidence in the record to this effect. [Record, pp. 59, 60.] "The extent of

my licensees since the issue of this patent, some four or five hundred thousand dollars.” Doing business in twenty odd states of the Union and in Canada. The product of the various plants in the United States turning out the Shope brick is “from two to three hundred thousand face brick per day.”

It is clear that the process or method as set forth in the patent, is absolutely new when properly understood. The patent established a *prima facie* case as to its novelty and usefulness. A green brick in the process of formation and while green, had never before been made waterproof on its face by the described process or method.

His Honor Judge Bean, in the District Court, before whom the entire prior art was displayed and discussed, held that the patent was valid and infringed. The patent does not exclude pressure and count upon gravity to do the work, as stated in the opinion of the court. The process simply requires sufficient agitation, whether by rubbing or stippling, to stimulate and accelerate the absorption action, and this is exactly what Ward & Peterson do. Absolutely the only difference between the two methods is that Ward & Peterson mix the water and powdered cement together first, and then while in a soft moist condition, *capable of an absorption action*, they place it on the semi-dry brick, and agitate it by rubbing it and also by stippling it, and they do it ON A GREEN BRICK, the thing which had never been done until Shope did it. Therefore, when they make “Oriental brick” as per Exhibit Y, they do

the mixing and stippling of the colored cement on the surface of the brick exactly as specified in the Shope patent.

We have set forth sufficient reasons, we believe, to convince this court that there should be a short rehearing, in order that appellee's case should be presented by one experienced in presenting patent matters, and in pointing out to the court the various features of differentiation between the patented process and the prior art. This we believe is due to the Shope Brick Company, and to the licensees operating under said patent, for to limit the patent and thus point out how others can avoid the patent while taking advantage of the real heart thereof, is a miscarriage of justice.

Very respectfully submitted,

THE SHOPE BRICK COMPANY,

By WILLIAM R. LITZENBERG,

Attorney.

506 Security Bldg., Los Angeles.

February 2, 1925.

Counsel for plaintiff and appellee hereby certifies that in his judgment the foregoing petition is well founded, and it is not interposed for delay.

WILLIAM R. LITZENBERG. *ms.*